

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF PUERTO RICO

3 PABLO ALVAREZ-ORTEGA,

4 Petitioner,

5 v.

6 UNITED STATES OF AMERICA,

7 Respondent.

Civil No. 10-1435 (JAF)

(Crim. No. 07-453)

8 **OPINION AND ORDER**

9 Petitioner brings this pro-se petition for relief from a federal court conviction pursuant to  
10 28 U.S.C. § 2255. (Docket No. 1.) Respondent opposes (Docket No. 3), and Petitioner replies  
11 (Docket No. 4).

12 **I.**

13 **Factual History**

14 In 2008, Petitioner pleaded guilty to conspiracy to possess with intent to distribute controlled  
15 substances, in violation of 21 U.S.C. §§ 841(a)(1), 846, 860, and to possession of firearms during  
16 and in relation to a drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1)(A)(i). (Docket  
17 Nos. 1 at 1; 3 at 1–2.) He was sentenced to 138 months’ imprisonment, and his conviction and  
18 sentence were affirmed on appeal. (Id. at 1–2.)

19 **II.**

20 **Standard for Relief Under 28 U.S.C. § 2255**

21 A federal district court has jurisdiction to entertain a § 2255 petition when the petitioner is  
22 in custody under the sentence of a federal court. See 28 U.S.C. § 2255. A federal prisoner may

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1 challenge his or her sentence on the ground that, inter alia, it “was imposed in violation of the  
 2 Constitution or laws of the United States.” Id. The petitioner is entitled to an evidentiary hearing  
 3 unless the “allegations, accepted as true, would not entitle the petitioner to relief, or . . . ‘are  
 4 contradicted by the record, inherently incredible, or conclusions rather than statements of fact.’”  
 5 United States v. Rodríguez Rodríguez, 929 F.2d 747, 749–50 (1st Cir. 1991) (quoting Dziurgot v.  
 6 Luther, 897 F.2d 1222, 1225 (1st Cir. 1990)); see 28 U.S.C. § 2255(b).

### 7 III.

#### 8 Analysis

9 Because Petitioner appears pro se, we construe his pleadings more favorably than we would  
 10 those drafted by an attorney. See Erickson v. Pardus, 551 U.S. 89, 94 (2007). Nevertheless,  
 11 Petitioner’s pro se status does not excuse him from complying with procedural and substantive law.  
 12 Ahmed v. Rosenblatt, 118 F.3d 886, 890 (1st Cir. 1997).

13 Petitioner claims that his counsel was deficient in researching the law surrounding charges  
 14 under § 924.<sup>1</sup> (Docket No. 1-2.) Petitioner further claims that counsel advised him to plead guilty  
 15 based on that misinformation and that he would not have pleaded guilty otherwise. (Id. at 3–4.)

16 The Sixth Amendment “right to counsel is the right to the effective assistance of counsel.”  
 17 Strickland v. Washington, 466 U.S. 668, 686 (1984) (internal quotation marks omitted); see U.S.  
 18 Const. amend. VI. To establish ineffective assistance, a petitioner must show both that his  
 19 counsel’s performance was deficient and that he suffered prejudice as a result of the deficiency.  
 20 Strickland, 466 U.S. at 686-96. To show deficient performance, a petitioner must “establish that  
 21 counsel was not acting within the broad norms of professional competence.” Owens v. United

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<sup>1</sup> Petitioner also alleges that counsel was deficient in not arguing insufficiency of evidence before the court (Docket No. 1-2 at 3, 7), but in the context of a guilty plea, no such opportunity existed. We, therefore, view Petitioner’s as a challenge of counsel’s advice to plead guilty.

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1 States, 483 F.3d 48, 57 (1st Cir. 2007) (citing Strickland, 466 U.S. at 687–91). To show prejudice  
 2 in the context of a guilty plea, a petitioner must demonstrate that “there is a reasonable probability  
 3 that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going  
 4 to trial.” Hill v. Lockhart, 474 U.S. 52, 59 (1985).

5 Petitioner describes his exchange with his counsel when the two discussed whether  
 6 Petitioner should plead guilty to the § 924 charge. (Docket No. 1-2 at 6.) He explains that counsel  
 7 showed him the statements of two confidential sources, both of whom stood ready to testify as to  
 8 Petitioner’s possession or use of firearms. (Id.) On the basis of that evidence, Petitioner’s counsel  
 9 advised him to plead guilty to the § 924 charge. (Id.)

10 In arguing why this counsel was deficient in so advising, Petitioner makes three points: (1)  
 11 “neither statement made any reference to drug trafficking or how the firearm furthered any drug  
 12 trafficking crime”; (2) “Petitioner, when arrested, was not in possession of drugs or firearms”; and  
 13 (3) Petitioner was in any case innocent of the charge. (Id.) All of these, however, were known to  
 14 both Petitioner and counsel at the time of the decision to plead guilty. That is, Petitioner has failed  
 15 to identify the counsel’s failure to research that underlies his ineffective assistance of counsel claim.  
 16 Given this failure, Petitioner cannot show deficient performance, as required by Strickland.

#### 17 IV.

#### 18 Certificate of Appealability

19 Under Rule 11 of the Rules Governing § 2255 Proceedings, whenever we deny § 2255 relief,  
 20 we must also determine whether to issue a certificate of appealability (“COA”). We grant a COA  
 21 only upon “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2).  
 22 To make this showing, “[t]he petitioner must demonstrate that reasonable jurists would find the  
 23 district court’s assessment of the constitutional claims debatable or wrong.” Miller-El v. Cockrell,  
 24 537 U.S. 322, 338 (2003) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)).

